

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re ACCREDO HEALTH, INC.
SECURITIES LITIGATION

This Document Relates To:

ALL ACTIONS.

) Civil Action No. 03-2216-BBD

) CLASS ACTION

) LEAD PLAINTIFFS' MOTION *IN LIMINE*
) #14 TO PRECLUDE DEFENDANTS FROM
) PRESENTING AT TRIAL THE
) BOILERPLATE DEFENSES CONTAINED
) IN THEIR ANSWER TO THE COMPLAINT

Lead Plaintiffs, Louisiana School Employees' Retirement System and Debra Swiman (together, "Lead Plaintiffs") and the Class of investors who purchased Accredo stock between June 16, 2002 and April 7, 2003, respectfully ask the Court to prohibit Defendants from presenting, at trial, the boilerplate defense contained in their Answer to the Complaint, because Defendants have failed to support those defenses with any evidence.

The Defendants asserted numerous defenses in their Answer to the Consolidated Complaint for Violation of the Federal Securities Laws (the "Complaint"). *See* Defendants' Answer (Docket No. 127). The overwhelming majority are inapplicable boilerplate defenses. Indeed, to date Defendants have produced no evidence to support these defenses and raised none of these defenses in the parties' extensive summary judgment briefing. Accordingly, these defenses are deficient as a matter of law and defendants should therefore be precluded from presenting these defenses at trial. *See United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 482 (6th Cir. 1999) (noting that defendant, "***as a matter of law***, failed to prove that it merited [an instruction on a defense]" because the evidence did not support the existence of the defense);¹ *United States v. Koami Kpomassie*, 323 F. Supp. 2d 894, 900 (W.D. Tenn. 2004) ("the ***defendant must first make a prima facie showing*** to the Court that facts exist to support the defense. Whether there is sufficient evidence to submit the defense to the jury is a question of law."); *Safeco Ins. Co. of Am. v. O'Hara Corp.*, Case No. 08-CV-10545, 2008 U.S. Dist. LEXIS 48399, at *2-*3 (W.D. Mich. June 25, 2008) (granting plaintiff's motion to strike defendant's inapplicable, boilerplate defenses, because "[b]oilerplate defenses clutter the docket and, further, create unnecessary work. . . . [T]he court is persuaded that they are boilerplate and not ***presently*** sustainable. . . . There is no analysis regarding the applicability of any of the . . . defenses to Plaintiff's complaint.") (emphasis in original); *Pucci v. Litwin*, No. 88 C

¹ All emphasis added and all internal quotations and citations omitted, unless otherwise noted.

10923, 1993 U.S. Dist. LEXIS 13902, at *9 (N.D. Ill. Oct. 4, 1993) (granting motion *in limine* to exclude evidence with respect to defenses found deficient as a matter of law).

Defendants assert some thirty defenses in their Answer to the Complaint, each of which alleges that the claims of the plaintiffs and members of the class are barred, in whole or in part. However, Defendants do not *explain* in their Answer the basis for any of the defenses and have presented neither evidence nor analysis in support of the overwhelming majority of them. Indeed, in their Motion for Summary Judgment, Defendants only challenge *some* of the elements of the section 10(b) claim (*i.e.*, scienter, materiality and loss causation) and assert a lack of “controlling person” liability under section 20(a) solely due to the purported failure of the section 10(b) claim. *See* Defendants’ Memorandum in Support of Their Motion for Summary Judgment (Docket No. 363-2). Nowhere in their Summary Judgment pleadings do Defendants raise or argue *any* of the boilerplate defenses asserted in their Answer to the Complaint. Allowing Defendants to raise these inapplicable defenses would only serve to confuse and mislead the jury while unnecessarily consuming the valuable time of all involved. As such, Defendants should be precluded from now raising these defenses.

DATED: September 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 8, 2008.

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